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Before the Department of Health

State of Hawai'i

Sierra Club's Petition to Amend Hawai'i) Petition; Exhibits 1-4
Administrative Rules Chapter 11-281, the)
Underground Storage Tanks Rules, to Protect)
the Southern O'ahu Basal Aquifer)

SIERRA CLUB'S PETITION TO AMEND HAWAII ADMINISTRATIVE RULES
CHAPTER 11-281, THE UNDERGROUND STORAGE TANKS RULES,
TO PROTECT THE SOUTHERN O'AHU BASAL AQUIFER

To protect our drinking water, the Sierra Club petitions the State of Hawai'i Department of Health to amend its rules. This petition is filed pursuant to Article IX sections 1 and 8, and Article XI sections 1, 7 and 9 of the Hawai'i State Constitution; HRS § 91-6; and HAR §11-1-51.

In short, Hawai'i State Constitution and HRS § 342L-32 require that the Department of Health amend its underground storage tank rules because the rules fail to protect the quality of the water that Sierra Club members and other residents of O'ahu drink.

I. The Sierra Club's Interest

Members of the Sierra Club, who live and work on O'ahu, depend on clean water for their very survival. More than 2500 dues paying members of the Sierra Club live on O'ahu and are dependent on water from the aquifer below Red Hill.

II. The Navy's Red Hill Bulk Fuel Storage Facility Threatens Our Water Supply

On November 30, 1987, the Environmental Protection Agency designated the Southern O'ahu Basal Aquifer, stretching from Schofield Barracks through urban Honolulu, as the "principal source of drinking water" that "if contaminated, would create a significant hazard to public health." 52 Federal Register 45497. The Environmental Protection Agency found:

1. The Southern Oahu Basal Aquifer currently serves as the **"principal source" of drinking water** for approximately 763,000 permanent residents within the Pearl Harbor

area.

2. **There is no existing alternative drinking water source**, or combination of sources, which provides fifty percent or more of the drinking water to the designated area, nor is there any demonstrated available alternative future source capable of supplying the area's drinking water needs.

3. Although the water quality over most of the study area is satisfactory for domestic use, widespread potential exists for degradation. The **main threats** to the quality of the basal aquifer include salt water intrusion; recharge from excess irrigation; industrial, **military and urban sources**; landfills; chemical spills; poorly situated injection wells; and cesspools.

Id. See Exhibit 1

The Navy's Red Hill Bulk Fuel Storage Facility threatens the Southern O'ahu Basal Aquifer. The Red Hill Bulk Fuel Storage Facility holds twenty underground fuel storage tanks and is located a mere one hundred feet above the primary aquifer serving residents from Hālawā to Mānoa. Each tank can hold more than ten million gallons of petroleum. Since its construction in the 1940s, more than thirty leaks at the Navy's Red Hill Bulk Fuel Storage Facility have unleashed more than 170,000 gallons of fuel into the environment. Exhibit 4. In January 2014, the U.S. Navy spilled 27,000 gallons of jet fuel. Petroleum has been repeatedly detected in groundwater monitoring wells. The carcinogens naphthalene and benzene have been detected in wells at Red Hill. *Id.*; and Exhibit 2.

III. The Department of Health's Legal Responsibilities

The Department of Health is constitutionally and statutorily obligated to enact rules that protect our drinking water from contamination.

A. The Department of Health's Constitutional Obligations

The Department of Health is constitutionally obligated to protect our drinking water from contamination. The mandate to protect our water is articulated repeatedly in our state constitution. Hawai'i State Constitution Article IX section 1, and Article XI sections 1 and 7. And the Hawai'i Supreme Court has consistently held that the public trust doctrine obligates the state, including the Department of Health, to protect the purity of our water.

The public trust doctrine applies to all water resources without exception or distinction. The state water resources trust thus embodies a dual **mandate of 1) protection** and 2) maximum reasonable and beneficial use. The public trust is, therefore, **the duty and authority to maintain the purity** and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.

Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014)(brackets, citations and quotation marks omitted; emphasis added).

When an agency is confronted with its duty to perform as a public trustee under the

public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.

Id. (citations omitted). *See also* Article IX section 8 and Article XI section 9 of the Hawai‘i State Constitution. The Department of Health has the duty to protect our water quality. *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 140 P.3d 985 (2006) (“As guardian of the water quality in this state, DOH then must not relegate itself to the role of a mere umpire ... but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.”). These constitutional obligations require that the Department of Health act as a prudent trustee would.

B. The Department of Health's Statutory Obligations

The Department of Health is the state agency with the primary responsibility to protect water quality. *See e.g.* HRS §§ 174C-66, 340E-2, 342-1.1, 342D-4, and 342D-50.

In 1989, the legislature codified HRS chapter 342L, the underground storage tank law, to give the Department of Health the tools it needed to protect our water supply. The law contains nine exemptions to the term underground storage tank. HRS § 342L-1. “Field-constructed underground storage tanks” are not identified among the statutory exemptions.

In 1992, the legislature amended HRS §342L-32 to require the Department of Health to adopt rules to ensure that pre-existing underground storage were upgraded. Prior to 1992, the law required that the Department of Health enact rules related to “design, construction, installation, release detection and compatibility” for “underground storage tanks brought into use on or after the effective date of the standards.” Act 212 1989 Hawai‘i Session Laws at 497. The 1992 legislature amended this requirement in three significant ways. First, it deleted the language limiting the requirement only to new tanks. Act 259 1992 Hawai‘i Session Laws at 683. Second, it added a requirement that the rules require that tanks be “upgraded.” *Id.* Third, the legislature specifically added language requiring that existing tanks be upgraded within six years: “**Existing underground storage tanks or existing tank systems shall be replaced or upgraded not later than December 22, 1998**, to prevent releases for their operating life.” Act 259 1992 Hawai‘i Session Laws at 683; HRS §342L-32(b)(3). There are no exemptions to this statutory requirement. These three statutory changes leave no room for a contrary interpretation. The Department of Health was required to enact rules for upgrading all underground storage tanks, including existing ones. These standards must ensure that the tank and tank systems are “designed, constructed, installed, **upgraded**, maintained, repaired, and operated **to prevent releases** of the stored regulated substances for the operational life of the tank or tank system.” HRS §342L-32(b)(1). *See* Exhibit 3.

IV. **Deficiencies in the Department of Health's Existing Underground Storage Rules**

The Department of Health's underground storage tank rules suffer from two deficiencies that jeopardize our water supply. First, the Department of Health has created an exemption where

none is authorized by statute. Second, more than two decades after being commanded to act, it has failed to enact rules requiring the upgrading of existing tanks.

"It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement. Furthermore, an agency's authority to promulgate rules is limited to enacting rules which carry out and further the purposes of the legislation and do not enlarge, alter, or restrict the provisions of the act being administered." *Lales v. Wholesale Motors Company*, 133 Haw. 187, 328 P.3d 341, 363 (2014)(citations and quotation marks omitted)

The legislature created nine exemptions from the requirements of HRS chapter 342L. HRS § 342L-1 (definition of "underground storage tank"). It, however, did not create an exemption for "field-constructed underground storage tanks and tank systems located on military installations owned and operated by the United States Department of Defense." Nevertheless, the Department of Health exempted these dangerous facilities from many of the underground storage tank requirements. *See* HAR § 11-281-01(b)(2). This exemption contradicts the legislature requirement in HRS § 342L-32 and undermines the legislative purpose in enacting HRS chapter 342L. It is particularly unwarranted where such an exemption jeopardizes public water. The purpose of Hawai'i Administrative Rules Chapter 11-281 is to "prevent releases." HAR § 11-281-11 and HRS § 342L-32(b)(1). The Red Hill exemption is inconsistent with the Department of Health's public trust obligations. There is no logic in exempting the underground storage tanks that have proven to pose the greatest threat to our water supply.

More than two decades since the legislature commanded the Department of Health to enact rules, it has failed to do so. The Department of Health has failed to enact any rules that ensure that underground storage tank and tank systems are "upgraded" to prevent releases. Hawai'i Administrative Rule 11-281 contains ten subchapters (scope and applicability; design, construction, and installation; notification, permits and variances; general operating requirements; release detection; release reporting, investigation, and confirmation; release response action; closure and change-in-service; financial responsibility; and enforcement); none of these subchapters address upgrading underground storage tanks. Old underground storage tanks need to be upgraded to protect our drinking water from contamination. The releases from the Navy's Red Hill Bulk Fuel Storage Facility provide compelling evidence of this need.

V. Consequences of Not Amending Rule

It is well settled that this court's foremost obligation in construing a statute is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Hanabusa v. Lingle, 119 Hawai'i 341, 347, 198 P.3d 604, 610 (2008) (duty to act is enforceable when the duty is "postponed unreasonably" and not performed after the passage of an "unreasonable period of time"). Please keep in mind that

public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the

statute under which it is conferred. Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down.

Stop H-3 Ass'n v. State [Dep't] of Transp., 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) (internal citations omitted); *In re Doe Children*, 73 Haw. 15, 19, 827 P.2d 1144, 1146 (1992) (rules enacted by administrative agency cannot contravene the statute the agency is implementing); "[T]he court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency[.]" HRS § 91-7(b). The failure of the Health Department to amend its rules to conform them to the statutory mandate puts them -- like our water -- at risk.

VI. Text of the Proposed Rule Amendment

HAR 11-281-01(b) is amended by deleting the following stricken language:

(b) Owners and operators of the following special types of underground storage tanks or tank systems, as more generally defined in section 11-281-03, are subject only to the requirements of subchapters 6, 7, 8 and the requirements of sections 11-281-12 and 11-281-13:

~~(1) Airport hydrant fuel distribution USTs and tank systems directly connected to underground hydrant piping used to fuel aircraft.~~

~~(2) Field constructed underground storage tanks and tank systems located on military installations owned and operated by the United States Department of Defense.~~

HAR §11-281-17(a) is amended by deleting the following stricken language:

~~An UST or tank system installed on or after the effective date of these rules must be provided with secondary containment designed, constructed and installed in a manner consistent with the requirements of this subchapter.~~

A new subsection is added by adding the following underlined language:

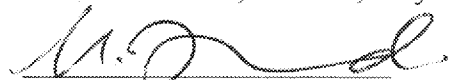
11-281-20. Upgrades. All existing underground storage tanks as that term is statutorily defined must be upgraded to comply with requirements of this subchapter, including, but not limited to secondary containment.

VII. Conclusion

The time for the Department of Health to act is now. More than two decades after the state legislature ordered the department to enact rules to ensure that underground storage tanks are upgraded to prevent spills, the department has failed to do so. Moreover, its special exemption for department of defense field system has no basis in law and is indefensible given the damage that these tanks have caused to our aquifer and the threat they pose to our water supply. Failure

to commence the rulemaking process within thirty days of this petition unnecessarily jeopardizes our water supply — and subjects the department to litigation.

Dated: Honolulu, Hawai'i, May 24, 2017.

A handwritten signature in black ink, appearing to read 'D. Frankel', written over a horizontal line.

David Kimo Frankel

Martha Townsend

Sierra Club